Filed 6/28/19 Marriage of Mendelssohn CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of JEFFREY MENDELSSOHN and ANDREA MENDELSSOHN.	
JEFFREY MENDELSSOHN, Respondent, v. ANDREA MENDELSSOHN, Appellant.	A151858 (Alameda County Super. Ct. No. AF13683671)

Andrea Mendelssohn (Wife) appeals from a judgment on reserved issues in a marital dissolution action. Wife claims the trial court erred in: (1) granting the motion of Jeffrey Mendelssohn (Husband) to exclude evidence of Wife's separate property contribution towards the purchase of their community property home and denying Wife's claim for reimbursement of that contribution under Family Code[1] section 2640; (2) denying Wife's request to be reimbursed for the community funds Husband took from her medical business to remodel the home; and (3) finding Wife waived her entitlement to all spousal support as part of a compromise agreement between the parties. We will affirm.

[1] All further statutory references are to the Family Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

Wife and Husband married in 1993, after Wife's first year of medical school. During their marriage, Wife started her own medical business and Husband—who earned an MBA from Stanford—worked as her office manager from 2005, around the time of the birth of their only child, up until 2010. The couple purchased a home together that underwent remodeling in 2010. In June 2013, Husband petitioned the court for dissolution of the marriage. The parties separated in July 2013.

In mid-2015, prior to many of the state court proceedings at issue in this appeal, Wife alone filed a petition for bankruptcy. The bankruptcy court took control of the family home to sell it to satisfy bankruptcy creditors. In late 2015, the bankruptcy trustee sold the family home to Husband. Wife claimed a homestead exemption in bankruptcy court, which set aside $100,000 from the sale proceeds to be divided as a community asset in the state family law case.

At a state family law proceeding in July 2015, Wife and Husband appeared represented by separate counsel, who informed the trial court and read into the record agreements the parties had reached, including a mutual permanent waiver of spousal support. In October 2015, the court issued a written order memorializing that waiver.

The remainder of the relevant family law proceedings were then held on several days in 2016, during which the parties litigated their claims for reimbursement. As relevant here, Wife intended to seek reimbursement for her separate property down payment towards the family home. Husband, however, moved to preclude Wife from introducing evidence of that separate property down payment pursuant to section 2640. Husband argued reimbursement under section 2640 was unavailable to Wife because the home was no longer community property as it was sold during the earlier bankruptcy proceeding, and there was no equity left in the property at the time of division. Husband had earlier testified that when he bought the family home from the bankruptcy trustee during Wife's bankruptcy proceedings, he obtained financing to pay off the home's existing mortgage, and also to pay to the trustee the couple's total equity in the home. At the hearing on Husband's motion in limine, Wife—who appeared pro se—argued she

should be able to seek reimbursement because Husband would not have a house but for her separate property down payment and because of the way Husband "basically removed all my money and assets." When pressed to respond to Husband's argument that section 2640 precluded reimbursement, Wife said, "I clearly put this money in. I don't know what all the legal stuff is about." The trial court granted Husband's motion and denied Wife's section 2640 reimbursement claim, reasoning there was nothing to reimburse because the net value of the property at the time of division was zero, and there was no property to divide since the property was sold and no longer owned by the community.

Wife also sought reimbursement for community funds taken from her medical business, alleging Husband embezzled the funds from the business and illegally used them to remodel the home without her knowledge. In sum, Wife testified that unbeknownst to her, Husband paid about $144,000 from the medical business account towards the remodeling, and some of the remodeling costs were incurred because Husband made cosmetic choices on his own, e.g., about cabinetry materials, doors, windows, and appliances. She also testified that when Husband quit being her office manager, he left the business with $225,000 worth of debt that had gone into the house.

At the conclusion of the proceedings, the trial court issued a statement of decision. As pertinent here, the court: (1) awarded Husband $50,000 as reimbursement for community property funds used to pay Wife's post-separation debts and bankruptcy administration fees; (2) awarded Husband $30,768.22 as reimbursement for use of his separate property funds to pay pre-existing community property debt; (3) denied each of Wife's separate requests for reimbursement, finding them unsupported by sufficient evidence; and (4) reiterated its earlier denial of Wife's request for reimbursement under section 2640. To enforce Husband's award, the court ordered Wife to recoup and pay Husband $23,890 in pre-paid rent on her apartment and $4,000 in funds held in a trust account; the source of these funds would be the homestead exemption Wife received in bankruptcy court. The remaining balance would then be reduced to a money judgment. The court also denied Wife's request for spousal support arrears, finding Wife waived permanent spousal support.

On May 15, 2017, the trial court signed and filed a judgment on reserved issues stating the balance of the amount that Wife owed Husband was $53,863.51. Notice of entry of the judgment was filed the same day. Wife appealed.

DISCUSSION

A. Reimbursement for Wife's Separate Property Contribution Towards the Purchase of the Family Home

Section 2640 provides, in part: "In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. *The amount reimbursed . . . may not exceed the net value of the property at the time of the division.*" (§ 2640, subd. (b), italics added.) " 'Contributions to the acquisition of property,' as used in this section, include downpayments." (*Id.*, subd. (a).)

The trial court in this case granted Husband's motion to preclude Wife from introducing evidence of her separate property down payment towards the home and denied Wife's claim for reimbursement pursuant to section 2640. The court reasoned there was nothing to reimburse because the net value of the property at the time of division was zero, and there was no property to divide since the property was sold and no longer owned by the community. This ruling was supported by Husband's testimony concerning his purchase of the family home in late 2015, during Wife's bankruptcy proceedings. More specifically, Husband testified the bankruptcy court took control of the home to sell it to satisfy Wife's separate property debts. When Husband purchased the home after he and Wife separated, he obtained separate property funds to pay off the existing mortgage and also pay to the bankruptcy trustee the couple's total equity in the home. (See *In re Marriage of Neal* (1984) 153 Cal.App.3d 117, 126, fn. 13 [indicating that former Civil Code section 4800.2 (now Family Code section 2640) limited the amount to be reimbursed by the "net value of the property at the time the court divides it," which is measured by the equity value at the time of division], disapproved on other

grounds in *In re Marriage of Buol* (1985) 39 Cal.3d 751, 763, fn. 10, and *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, fn. 13; see also § 771, subd. (a).)

Wife did not challenge the trial court's application of section 2640 below, nor did she in her appellate briefs.[2] Instead, Wife presently argues it was "highly inequitable" to deny her reimbursement for her separate property down payment while granting Husband reimbursement for various debts he paid on behalf of the community, some of which he caused through his mismanagement of the medical business. We reject the argument.

Implicit in Wife's argument, and necessary to its success, is the claim that the trial court could have circumvented section 2640 and reimbursed her because otherwise the resulting award would be inequitable. Wife, however, does not cite any portion of the record on appeal indicating she made that specific argument below. (*Aaron B., supra,* 46 Cal.App.4th at p. 846 [a party is precluded from urging on appeal any point not raised in the trial court].) Wife did appear to seek reimbursement for her separate property downpayment on grounds of general fairness, such as when she stated Husband would not have the house but for her and "she clearly put this money in." But she never posited that the court could simply ignore section 2640 and award her reimbursement if it determined it would be equitable to do so. (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 306, fn. 4 [specific argument never raised before the trial court cannot be raised for the first time on appeal].) Whether to exercise its equitable powers would have been a determination in the sound discretion of the trial court. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 770–771.) That type of determination is not a "legal question determinable from facts that are (1) uncontroverted in the record and (2) could not have been altered by the presentation

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[2] During oral argument, Wife argued there was equity left in the home because of the money the parties received from the homestead exemption awarded in bankruptcy court. We decline to consider this contention, as it was raised for the first time during oral argument. (*People v. Pena* (2004) 32 Cal.4th 389, 403 (*Pena*) [" '[a]n appellate court is not required to consider any point made for the first time at oral argument, and it will be deemed waived' "].) Additionally, the argument was not made below. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 (*Aaron B.*).)

of additional evidence." (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237–1238 [discussing an exception to the general rule that issues not raised in the trial court can be considered for the first time on appeal].)

Even if the issue were adequately preserved, the appellate claim fails due to the same deficiency. On appeal, Wife presents no developed argument establishing that the trial court could have circumvented section 2640 and ordered reimbursement due to the equitable considerations she now advances. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].) While Wife correctly notes that family law courts are courts of equity, case law specifically instructs that "[r]ules of equity cannot be intruded in matters that are plain and fully covered by positive statute [citation]. . . . Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (*Lass v. Eliassen* (1928) 94 Cal.App. 175, 179; *Bi-Rite Meat & Provisions Co. v. City of Hawaiian Gardens Redevelopment Agency* (2007) 156 Cal.App.4th 1419, 1433, fn. 12.)

Here, section 2640, found in division 7 of the Family Code, expressly governs when a court may or may not reimburse parties for their separate property down payment. (§ 2550 ["*Except . . . as otherwise provided in this division*, in a proceeding for dissolution of marriage . . . , the court shall, either in its judgment of dissolution of the marriage . . . , or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally"], italics added.) Section 2580 indicates section 2640 was passed to further the compelling state interest of providing consistency in the treatment of spousal interests in property held in joint title. Wife does not address the foregoing authorities, and there is case law indicating a trial court may not simply ignore section 2640 on equitable grounds. (See, e.g., *In re Marriage of Nicholson & Sparks* (2002) 104 Cal.App.4th 289, 293 & 297 [reversing a reimbursement award under section 2640 where trial court had found it equitable to

award former husband the amount of separate property funds he used to pay off credit card debt that enabled the former couple to qualify for a loan to purchase real property].)

At best, Wife cites to authority supporting the general equitable principles that one cannot take advantage of one's own wrong, and that " ' "in every transaction between [persons occupying confidential relations, such as husband and wife,] by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption." ' " (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 296, italics added.) These citations, however, are unaccompanied by argument explaining their application to the particular issue at hand. In light of the foregoing, we reject Wife's argument.

Relatedly, Wife contends it was inequitable for the trial court to deny her section 2640 reimbursement claim because Husband received half of the homestead exemption funds that she obtained in bankruptcy court, and Husband could not have obtained those funds as he was not a bankruptcy petitioner.[3] Again, this claim was not raised below, and we reject it for the same reasons discussed above.

In sum, we reject Wife's claim that the trial court erred in granting Husband's motion to exclude evidence of her separate property down payment and in denying her claim for reimbursement of that contribution.

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[3] Wife's opening brief advanced this argument under the heading: "The Trial Court Erred in Finding That Appellant Wife was Not Entitled to Entire Homestead Exemption." Husband responded, in part, that the issue was not justiciable because the trial court did not make orders allocating funds from the homestead exemption. We address the argument because, notwithstanding the title affixed to it, in substance it concerns the propriety of the denial of Wife's section 2640 claim, which is properly before this court.

We note, however, that in her reply brief, Wife argues for the first time that the trial court should have reimbursed her for the homestead exemption funds that Husband received because, as the sole party petitioning for bankruptcy, only she was entitled to the homestead exemption funds. We find the claim forfeited, because it is raised for the first time in Wife's reply brief, and because it is unaccompanied by adequate citations to the record or to authority. (*Opdyk v. California Horse Racing Board* (1995) 34 Cal.App.4th 1826, 1830; *Badie*, *supra*, 67 Cal.App.4th at pp. 784–785.)

B. Windfall

Wife filed a post-trial closing brief asking, among other things, to be reimbursed for money that Husband took from her medical business to remodel the home. Wife alleged Husband embezzled the funds from the business and illegally used them to remodel the home without her knowledge. In its statement of decision, the trial court denied Wife's requests for reimbursement, finding they were insufficiently supported by evidence.

Wife now claims it was inequitable and a windfall to Husband that he obtained the family home, while she was not reimbursed for the community funds he took from the business to remodel it. She argues there was substantial, unrebutted evidence that Husband drained assets from the business to remodel the family home, and there was no substantial evidence to support the court's denial of her reimbursement claim. She also asserts "[t]he trial court's Statement of Decision failed to make any findings on this issue despite there being substantial evidence that [Husband] received a windfall in the form of improvements he made to the home." We are not persuaded.

As discussed, the trial court denied the reimbursement request for the remodeling funds (as it did for all of Wife's reimbursement claims) as insufficiently supported by evidence. That decision is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Ibid.*) " 'The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. [Citation.] It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.' " (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887.)

To support her claim, Wife relies on the evidence she claims indicated that Husband surreptitiously funded the remodeling of the family home with money he took

from the business, and that Husband incorporated the business. Specifically, Wife testified it was Husband's goal to own a home by the age of 45, and so shortly before his 45th birthday, Wife put a down payment on a home. In 2010, the couple did remodeling on it, which Husband supervised during the time he stopped working as Wife's office manager and was unemployed, from about January to August 2010. Unbeknownst to her, Husband paid about $144,000 from the medical business account towards the remodeling, and some of the remodeling costs were incurred because Husband made cosmetic choices on his own (e.g., about cabinetry materials, doors, windows, and appliances). Around the time of the remodeling, Husband was telling Wife the business was hemorrhaging money. Husband made her incorporate the business in 2010—which cost them "thousands of dollars"—because he believed that if the business was incorporated and went bankrupt, their home and other community assets would be protected. Sometime around 2013, the couple consulted a bankruptcy attorney who disabused them of that notion. Wife testified that by the time Husband quit being her office manager, he left the business with $225,000 worth of debt that had gone into the house. Wife asserts the foregoing was unrebutted.

As Husband points out, however, Wife does not discuss the evidence that is unfavorable to her claims of embezzlement and wrongdoing. For instance, Wife's own testimony established the following. Wife and Husband lived in a tent in the backyard of the property during the remodeling; she was aware there were costs associated with the remodel; all profits from the business went into their joint account; the couple had no "liquid" accounts other than their joint account to pay for the remodeling; and she had access to all of their financial accounts. Wife further testified that when they bought the house, they were told they needed to do about $50,000 worth of work, which is what the couple had in the bank. As the work progressed, however, more problems were discovered. They found charring in several places in the walls, and the carbon monoxide level was so high they would have died but for the windows leaking. They had to redo the heating, piping, and electricity, which required them to raise about 80 percent of the house. After testifying about these necessary repairs, Wife continued, "So right off the

bat, we could not afford this house. We thought we could. . . . And it was just bad luck that we had to do all that stuff to it."

In any case, the trial court was not bound to believe the evidence identified by Wife as supporting her position, contradicted or not. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.) A trier of fact may reject even the uncontradicted testimony of a witness, as long as it does not do so arbitrarily. (*Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170–171.) " 'The trier of the facts is the exclusive judge of the credibility of the witnesses. [Citation.] . . . [I]n passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case." (*Ibid.*) Moreover, "where uncontradicted testimony has been rejected by the trial court, it 'cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved.' " (*Adoption of Arthur M.*, *supra*, 149 Cal.App.4th at p. 717.) Here, based on the record as a whole, the court could rationally have disbelieved the evidence Wife presented to support her claim that Husband took money from the business without her knowledge to remodel the home.[4]

In sum, Wife fails to establish that insufficient evidence supported the trial court's decision to deny her requests for reimbursement.

C. Spousal Support

On July 28, 2015, Husband's counsel recited into the record the following agreement reached between the parties concerning spousal support: "[T]he parties agreed to a permanent waiver of spousal support effective today. Neither party may request temporary or permanent spousal support from the other. [¶] The Court hereby divests jurisdiction to award spousal support to either party. The parties have carefully considered their rights and entitlements to spousal support, and this termination is agreed

[4] A reasonable person could consider the parties' evidence and believe that Wife was aware when Husband took the money out of the business to remodel the home, or that she later became aware of it and acquiesced.

to as a part of their compromise." Wife's counsel indicated assent to this agreement on the record. Husband's counsel then told the trial court she would prepare a written order after the hearing. In October 2015, the court signed a written order with materially identical language, as follows: "Spousal Support: Permanent waiver effective today, neither party may require temporary or permanent spousal support. The Court hereby divests jurisdiction to award spousal support to either party. The parties have carefully considered their rights and entitlements to spousal support and this termination is agreed to as part of their compromise."

Later, at a January 11, 2016 hearing, Husband moved in limine to preclude Wife from presenting evidence or from requesting spousal support arrears on the ground that Wife's waiver included arrears. Wife objected, acknowledging they agreed to waive future support, but stating she consistently reserved the right to seek arrears and asserted her July 2015 waiver did not include waiver of the right to ask for retroactive support. The trial court denied Husband's motion, stating: "If she wants to present evidence on that topic she certainly may." Thereafter, Wife's testimony made no explicit mention of spousal support arrears. On April 4, 2016, Wife again admitted while testifying that she was represented by counsel and waived spousal support permanently, though she claimed she did so under duress. In its statement of decision, the court denied Wife's request for spousal support arrears, finding Wife waived permanent spousal support in open court on July 28, 2015 while represented by counsel.

Wife now asserts there is no evidence she knowingly and voluntarily waived spousal support because the trial court did not question or voir dire her on the record about her waiver. She also complains the court failed to require that she explicitly agree to permanent waiver of spousal support or declare that she had the ability to support herself going forward. This is unpersuasive.

"Waiver is an issue of fact tested on appeal under the substantial evidence standard." (*In re Marriage of Kelkar* (2014) 229 Cal.App.4th 833, 846.) In this case, substantial evidence appears. The record establishes that Wife was represented by counsel and present in court when her attorney told the trial court that the parties had

reached a compromise agreement that included a waiver of spousal support. Husband's attorney then read that agreement into the record. The court's October 2015 order memorializing and approving the spousal support agreement clearly and explicitly divested the court of jurisdiction to order spousal support and included the statement that "[t]he parties have carefully considered their rights and entitlements to spousal support and this termination is agreed to as part of their compromises." Wife did not object at the July 2015 hearing when the agreement was recited into the record, and she does not assert she ever filed a written objection to the court's 2015 order. Further, at the January 11, 2016 hearing after Husband moved in limine to prevent Wife from presenting evidence of or asking for spousal support arrears, Wife asserted on the record that she agreed to give up permanent spousal support but stated she did not give up the right to ask for retroactive support. When Wife testified on April 4, 2016, she admitted she was represented by counsel and waived spousal support permanently, though she claimed she did so under duress.[5]

Wife cites to *In re Marriage of Moore* (1980) 113 Cal.App.3d 22 (*Moore*) and *In re Marriage of Vomacka* (1984) 36 Cal.3d 459 (*Vomacka*) in support of her contention that there is no evidence of a valid waiver of spousal support, as the court did not personally examine or voir dire her on the record about the waiver or whether she had the financial means to support herself. This unavailing. While *Moore* and *Vomacka* recognize that an agreement to terminate spousal support must be explicit (*Moore*, at p. 28; *Vomacka*, at p. 469), neither requires the type of court examination advocated by Wife. Nor do those cases cast doubt on the validity of a represented party's waiver when that party is present when his or her counsel explicitly confirms such waiver to the court.[6]

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[5] We note and accept Wife's representation in her reply brief that she is not presently claiming the waiver was involuntary because it was obtained under duress.

[6] Aside from cursory references to her income in her appellate briefing, Wife did not address the contention made during oral argument that the evidence in the record fails to establish her ability to meet her future financial needs. The point was never raised below (*Aaron B., supra*, 46 Cal.App.4th at p. 846), and we decline to consider it now (*Pena, supra*, 32 Cal.4th at p. 403).

Finally, Wife claims that the waiver was only forward-looking, so as not to preclude spousal support back to the date the trial court reserved ruling on the issue of temporary spousal support. The plain language of the agreement, however, entailed a broad divestment of jurisdiction to award any spousal support, and this supports the court's finding that her waiver included retroactive support.

Additionally, even assuming Wife's waiver did not extend to arrears, her claim fails because she does not establish prejudice. (Code Civ. Proc., § 475.) As discussed, at the January 11, 2016 hearing Husband moved to preclude Wife from presenting evidence or requesting spousal support arrears, but the trial court denied Husband's motion and ruled that Wife could present evidence on the topic of arrears. Thereafter, however, Wife's testimony made no explicit mention of spousal support arrears. Wife does not presently explain what amount she believes Husband owes her, and she provides no citations to the record or to authority supporting a claim for spousal support arrears in any amount, undisputed or not. Nor does the record appear to contain any reference to a pre-determined amount of spousal support owing to her.

Considering the foregoing, Wife's cursory citation to *In re Marriage of Sabine & Toshio M.* (2007) 153 Cal.App.4th 1203 (*Toshio M.*) in her reply brief is unavailing. *Toshio M.* holds that parties can contract to settle support arrears claims only if there is a bona fide dispute regarding the amount owed. (*Id.*, at pp. 1214–1215.) In this case, Wife has not established that Husband owed her support arrears, or that any amount owed was undisputed.

In sum, we conclude there is no basis for overturning the trial court's finding of waiver.

DISPOSITION

The judgment is affirmed. Husband shall recover costs on appeal from Wife. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Fujisaki, J.

WE CONCUR:

_____
Siggins, P. J.

_____
Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.